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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ISIDRO PEREZ,

Defendant and Appellant.

B207438

(Los Angeles County
Super. Ct. No. YA065006)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Mark S. Arnold, Judge. Modified in part; affirmed in part.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Isidro Perez was convicted, following a jury trial, of one count of first degree murder of Vito Loveless in violation of Penal Code¹ section 187, subdivision (a). The jury found true the allegations that appellant personally used a firearm and personally and intentionally discharged a firearm causing death within the meaning of section 12022.53, subdivisions (b) through (d). The jury also found true the allegation that the murder was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b). The trial court sentenced appellant to 25 years to life for the murder conviction plus a 25-years-to-life enhancement term for the firearm allegation plus a 10-year term for the gang allegation, for a total term of 60 years to life in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in failing to instruct the jury on certain aspects of the murder charge using CALJIC Nos. 8.70, 8.71 and 8.74. Appellant also contends that the trial court erred in imposing a 10-year term for the gang allegation. Respondent agrees that the 10-year term is erroneous. We agree as well. We order the section 186.22 term corrected, as set forth in more detail in our disposition. We affirm the judgment of conviction in all other respects.

Facts

On May 18, 2006, between 10:30 and 11:00 p.m., Felicia Davies and Vito Loveless were on 133rd Street between Lemoli and Crenshaw. They tried to start Loveless's motorcycle. It made loud noises but would not start. Appellant appeared near a blue van parked in a driveway and told Davies and Loveless that they were being too noisy. He added that they were disrespecting his family. Loveless and Davies replied: "Well, my bad." They pushed the motorcycle and tried to go on their way.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Appellant asked Davies and Loveless where they were from. Loveless replied: "Hawthorne Little Watts." Appellant said that he was "Silent" from "EK."² He pulled out a gun. Loveless called "Dreamer," who lived nearby. Davies ran. Loveless, who was holding the motorcycle, said that he was not going to run in his own neighborhood. Davies ran behind a car.

Loveless began to walk toward Lemoli. Appellant followed Loveless and said, "Don't think I won't." Appellant then shot Loveless in the lower back. Appellant got into a white Toyota and left.

Loveless was taken to a hospital where he died the next morning.

At trial, a gang expert explained that Evil Klan and Hawthorne Little Watts were rival gangs and that the shooting took place in an area claimed by both gangs. The expert opined that the shooting was for the benefit of the Evil Klan gang.

Discussion

1. CALJIC Nos. 8.70, 8.71 and 8.74

Appellant contends that the trial court erred in failing to instruct the jury sua sponte with CALJIC Nos. 8.70, 8.71 and 8.74. He contends that the failure to give these instructions amounted to a failure to instruct on the prosecutor's burden of proof for murder, and that the error is reversible per se. In the alternative, appellant contends that without these instructions, the jury was unaware that it had a duty to find him guilty of second degree murder if it had a doubt as to the degree of the murder committed.

Respondent contends that the trial court does not have a sua sponte duty to give these instructions and that appellant has forfeited his claim by failing to request the instructions in the trial court. We see no forfeiture of this claim.

The trial court may have had a sua sponte duty to give CALJIC Nos. 8.70, 8.71 and 8.74. (Cf. *People v. Hinton* (2006) 37 Cal.4th 839, 883 [defendant asserted that trial court had a sua sponte duty to give these instructions, and Court reviewed claim of error

² Appellant was a member of the Evil Klan gang.

concerning omission of instructions].)³ The trial court clearly had a duty to instruct on the general principles of law governing the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Section 1097 contains such a principle: "When it appears that the defendant has committed a public offense or attempted to commit a public offense, and there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees only." The trial court also had a duty to instruct the jury on reasonable doubt and unanimity. It is appellant's claim that by omitting the specified CALJIC instructions, the trial court failed to instruct the jury on these principles.

Appellant's claim can also be understood as arising from a combination of instructions given (describing the degrees of murder) and not given (explaining how doubts about the proper degree should be resolved and how a verdict should be reached on the degree of the murder). Such claims may be reviewed on appeal pursuant to section 1259 even though the defendant would otherwise have waived any claim concerning an instruction not requested to be given. (*People v. Chavez* (1985) 39 Cal.3d 823, 830.)

Accordingly, we review appellant's claim of error. We find no prejudice to appellant.

The California Supreme Court has rejected a virtually identical claim of error in *People v. Hinton, supra*, 37 Cal.4th 839. In that case, the jury was not instructed with CALJIC Nos. 8.70, 8.71 and 8.74, but was instructed with CALJIC No. 8.30 and CALJIC No. 8.75. The defendant claimed that without the first three instructions, the jury would not have understood how doubts about the proper degree of the murder should be resolved. The Court explained: "In addition to CALJIC No. 8.75, which directed the jury to consider second degree murder if it was unable to find defendant guilty

³ The use notes to CALCRIM No. 521 concerning the degree of a murder state that the instruction is mandatory and must be given sua sponte. The last paragraph of that instruction states: "The People have the burden of proving beyond a reasonable doubt that the killing was a first degree murder rather than a lesser crime."

unanimously and beyond a reasonable doubt of first degree murder, the jury was instructed that a guilty verdict required unanimous agreement that defendant's guilt of the crime had been established beyond a reasonable doubt. Considering these instructions as a whole [citation], the jury was adequately instructed as to the significance of a reasonable doubt as to defendant's guilt of first degree murder and the availability of second degree murder as a lesser offense." (*Id.* at p. 883.) CALJIC No. 8.75 was not given in this case, but the other instructions in this case, read as whole were adequate to explain the topic.⁴

The jury in this case was thoroughly instructed on the burden of proof concerning all crimes. The jury was instructed: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. The presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." The jury was further instructed: "If, after considering the circumstances of the identification and any other evidence in this case, you have a reasonable doubt whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find him not guilty." The jury was also instructed pursuant to CALJIC No. 17.50: "In order to reach a verdict, all twelve jurors must agree to the decision and to any finding you have been instructed to include in your verdict." Finally, the jury was informed that the instructions should be considered as a whole and that each should be considered in light of all the others.

⁴ CALJIC No. 8.75 is entitled: "Jury May Return Partial Verdict – Homicide." The form is designed to prevent a jury from returning a verdict on a lesser offense of first degree murder without a unanimous finding that the defendant is not guilty of first degree murder. It tells the jury in part: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first degree murder and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of the lesser crime. [¶] . . . Murder in the second degree is a lesser crime to that of murder in the first degree."

The jury was thoroughly instructed on the crime of murder as well. CALJIC No. 8.10 told the jury that murder is the unlawful killing of a human being with malice aforethought. First degree murder was defined for the jury pursuant to CALJIC No. 8.20 as "[a]ll murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought." The jury was instructed pursuant to CALJIC No. 8.30 that second degree murder is the unlawful killing of a human being with malice aforethought "but the evidence is insufficient to prove deliberation and premeditation."

The above referenced instructions and the verdict forms in this case together compensated for the omission of CALJIC Nos. 8.70, 8.71 and 8.74.

CALJIC No. 8.70 tells a jury: "Murder is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree."

The verdict form for a finding of guilty in this case contained the following statement: "We further find that the Murder was of the FIRST / SECOND DEGREE [circle your decision]." This sentence clearly told the jury that they had to find the degree of the murder. The jury circled the word "FIRST" showing that they understood that their finding should be recorded on the verdict form. Thus, appellant was not prejudiced by the absence of CALJIC No. 8.70.

CALJIC No. 8.71 tells a jury: "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree [as well as a verdict of not guilty of murder in the first degree]."

The jury was instructed pursuant to CALJIC No. 8.30 that it should find the defendant guilty of second degree murder when a murder had been proved, but there was insufficient evidence of deliberation and premeditation. The jury was also instructed generally that if they had reasonable doubt, they should give the defendant the benefit of that doubt. The jury was instructed that "all twelve jurors must agree to the decision and

to any finding you have been instructed to include in your verdict" and thus were aware of the requirement of unanimity. Thus, appellant was not prejudiced by the absence of CALJIC No. 8.71.⁵

CALJIC No. 8.74 tells a jury: "Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find [him] [her] guilty of an unlawful killing, you must agree unanimously as to whether [he] [she] is guilty of [murder of the first degree] [or] [murder of the second degree]."

The language of the verdict form told the jury that the degree of the murder was a finding or decision that they should make. As we discuss, *supra*, the jury was instructed on the unanimity requirement for decisions or findings they made. Thus, appellant was not prejudiced by the absence of CALJIC No. 8.74.⁶

⁵ Appellant's reliance on *People v. Crone* (1997) 54 Cal.App.4th 71 to show uncured error in the omission of CALJIC No. 8.71 is misplaced. In *Crone*, the Court found that CALJIC No. 2.90 and other general instructions on the burden of proof did not adequately instruct the jury on what to do if it had a reasonable doubt whether the defendant committed the greater or lesser offense. Here, as we discuss, the jury was instructed generally on the concepts of reasonable doubt, but was *also* given CALJIC No. 8.30, which did tell them what to do if they found that the prosecution had proved murder, but believed that the prosecution had failed to prove first degree murder.

⁶ Appellant's reliance on *People v. Aikin* (1971) 19 Cal.App.3d 685 to show uncured error in the omission of a CALJIC No. 8.74 is misplaced. In *Aikin*, the jurors were instructed generally that "[i]n order to return a verdict it is necessary that all twelve of the jurors agree to the decision." The Court of Appeal nevertheless found a "deficiency" in the instructions because the jurors were not instructed specifically that there must be unanimity as to whether the crime was second degree murder or manslaughter. (*Id.* at p. 703, fn. 13.) Here, as we discuss, the jury was instructed that "[i]n order to reach a verdict, all twelve jurors must agree to the decision *and to any finding you have been instructed to include in your verdict.*" (Emphasis added.) The verdict form in this case showed that the degree of the murder was a finding that that jury had to make. That is sufficient to inform the jury of the requirement of unanimity.

2. Gang allegation sentencing

Appellant contends that the trial court erred in imposing a 10-year term pursuant to section 186.22, subdivision (b)(1)(C). Respondent agrees. We agree as well.

When a defendant is sentenced to a term of 25 years to life for first degree murder, the 10-year term of section 186.22, subdivision (b)(1)(B) does not apply. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1005.) The 15-year-to-life minimum parole eligibility term of section 186.22, subdivision (b)(5) applies. (*People v. Lopez, supra*, 34 Cal.4th at pp. 1004-1005, 1011.)

Disposition

Appellant's sentence is modified to replace the 10-year term imposed pursuant to section 186.22, subdivision (b)(1)(B) with a 15 year minimum parole eligibility term pursuant to section 186.22, subdivision (b)(5). The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting this change and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment of conviction is affirmed in all other respects.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.